(6)

No. 01-1444

COPY
Supreme Court, U.S.
FILED
SEP 5 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

BEN CHAVEZ, *Petitioner,*

v.

OLIVERIO MARTINEZ, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL F OR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, AS AMICUS CURIAE IN SUPPORT OF PETITIONER, BEN CHAVEZ

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
LEE E. SEALE
Deputy Attorney General
PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-2785
Fax: (916) 324-2960
Counsel for Amicus State of California

19 pp

QUESTION PRESENTED

Whether petitioner, a police officer, is entitled to qualified immunity in a lawsuit under 42 U.S.C. § 1983 alleging that his interrogation of respondent was unduly coercive, in violation of the Fifth and Fourteenth Amendments, where no statement made by respondent has ever been used against him in a criminal case.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE NINTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY FOR PETITIONER SERGEANT CHAVEZ BECAUSE THE LAW HAS NEVER BEEN CLEARLY ESTABLISHED THAT MERE COERCIVE QUESTIONING VIOLATES EITHER THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION OR THE SUBSTANTIVE COMPONENT OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE	3
A. Introduction	3
B. Respondent Martinez's Fifth Amendment Privilege Against Compelled Self-Incrimination Was Not Violated Because He Was Never Brought To Trial And His Statements Were Never Used Against Him	4
1. The Decisions Of This Court Have Made It Clear That *Miranda* Is A Trial Right Governing The Admissibility Of Evidence	5

TABLE OF CONTENTS (continued)

	Page
2. The Decisions Of Other Circuits Have Correctly Concluded That A Peace Officer's Non-Compliance With *Miranda* Does Not Violate A Suspect's Fifth Amendment Privilege Against Compelled Self-Incrimination And Therefore Cannot Give Rise To A Claim Under 42 U.S.C. § 1983	7
3. Since The Ninth Circuit's Erroneous View Of The Scope Of The Fifth Amendment Privilege Is Not "Clearly Established Law," Its Denial Of Qualified Immunity For Sergeant Chavez Was Improper	9
C. Police Conduct In The Field Must "Shock The Conscience" To Violate The Substantive Component Of The Fourteenth Amendment's Due Process Clause, A Standard That The Ninth Circuit Did Not Apply	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Amaya-Ruiz v. Stewart 121 F.3d 486 (9th Cir. 1997)	10
Bennett v. Passic 545 F.2d 1260 (10th Cir. 1976)	8
Berkemer v. McCarty 468 U.S. 420 (1984)	6
Cooper v. Dupnik 963 F.2d 1220 (9th Cir. 1992)	1, 8, 11
County of Sacramento v. Lewis 523 U.S. 833 (1998)	11
Davis v. City of Charleston 827 F.2d 317 (8th Cir. 1987)	8
Deshawn E. v. Safir 156 F.3d 340 (2nd Cir. 1998)	7
Dickerson v. United States 530 U.S. 428 (2000)	4, 6
Giuffre v. Bissell 31 F.3d 1241 (3rd Cir. 1994)	7, 9
Harlow v. Fitzgerald 457 U.S. 800 (1982)	4, 9
Jones v. Cannon 174 F.3d 1271 (11th Cir. 1999)	8

TABLE OF AUTHORITIES (continued)

	Page
Mahan v. Plymouth County House of Corrections 64 F.3d 14 (1st Cir. 1995)	7
Malloy v. Hogan 378 U.S. 1 (1964)	4
Martinez v. Oxnard 270 F.3d 852 (9th Cir. 2001)	Passim
Miller v. Fenton 474 U.S. 104 (1985)	10
Miranda v. Arizona 384 U.S. 436 (1966)	2, 5
Oregon v. Elstad 470 U.S. 298 (1985)	6
Riley v. Dorton 115 F.3d 1159 (4th Cir. 1997)	8
Rochin v. California 342 U.S. 165 (1952)	11
Shotwell Mfg. v. United States 371 U.S. 341 (1963)	10
United States v. Balsys 524 U.S. 666 (1998)	7
United States v. Verdugo-Urquidez 494 U.S. 259 (1990)	6

TABLE OF AUTHORITIES (continued)

	Page
Warren v. City of Lincoln 864 F.2d 1436 (8th Cir. 1989)	8
Wiley v. Doory 14 F.3d 993 (4th Cir. 1994)	10
Withrow v. Williams 507 U.S. 680 (1993)	6
Zinermon v. Burch 494 U.S. 113 (1990)	11
Constitutional Provisions	
United States Constitution	
Fourth Amendment	6
Fifth Amendment	Passim
Fourteenth Amendment	Passim
Statutes	
42 United States Code	
§ 1983	Passim

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1444

BEN CHAVEZ, *Petitioner,*

v.

OLIVERIO MARTINEZ, *Respondent.*

INTEREST OF AMICUS CURIAE

Relying primarily on its own analytically unsound decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit Court of Appeals has concluded that petitioner Sergeant Chavez violated both the Fifth Amendment privilege against compelled self-incrimination and Fourteenth Amendment Due Process Clause by subjecting respondent Martinez to "coercive, custodial interrogation while he received treatment for life-threatening gunshot wounds." *Martinez v. Oxnard*, 270 F.3d 852, 856 (9th Cir. 2001). In denying Sergeant Chavez's defense of qualified immunity, the Ninth Circuit has significantly expanded the potential for lawsuits against California's sworn peace officers. The Ninth Circuit appears to be the only federal circuit to have approved civil liability for the type of conduct involved in this case, and its conclusion contradicts numerous pronouncements from this Court.

The prospect of broad personal liability for engaging in investigative questioning will inevitably have a chilling effect upon peace officers as they investigate criminal cases. Accordingly, the State of California has a solemn obligation to seek its correction.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in denying petitioner Sergeant Chavez's defense of qualified immunity. The law has never been clearly established that it is possible for a peace officer in the field to violate a person's Fifth Amendment privilege against compelled self-incrimination. Indeed, contrary to the view of the Ninth Circuit, the Fifth Amendment privilege, as defined in *Miranda v. Arizona*, 384 U.S. 436 (1966), represents a trial right governing the admissibility of evidence and therefore cannot be a basis for suit under 42 U.S.C. § 1983. To be sure, police officers may be held liable under that section for their conduct in the field if it is found to "shock the conscience" under the substantive component of the Fourteenth Amendment's Due Process Clause. However, the Ninth Circuit failed to apply this standard in its analysis of Martinez's claims. Therefore, the Ninth Circuit's ruling should be reversed.

ARGUMENT

THE NINTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY FOR PETITIONER SERGEANT CHAVEZ BECAUSE THE LAW HAS NEVER BEEN CLEARLY ESTABLISHED THAT MERE COERCIVE QUESTIONING VIOLATES EITHER THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION OR THE SUBSTANTIVE COMPONENT OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

A. Introduction

By holding that Sergeant Chavez violated both the Fifth and Fourteenth Amendments by subjecting Martinez to coercive questioning, the Ninth Circuit conflated the distinct nature of each constitutional provision.

The Fifth Amendment privilege against compelled self-incrimination is a trial right governing the admission of evidence. Martinez cannot claim to have suffered a violation of this provision because he was never brought to trial and his statements were never used against him. Indeed, contrary to the Ninth Circuit's conclusion, police conduct in the field can never amount to a violation of this provision.

The substantive component of the Fourteenth Amendment's Due Process Clause permits recovery under 42 U.S.C. § 1983 only when official conduct is found to "shock the conscience." The Ninth Circuit erred by failing to apply this standard, concluding instead that "coercive" conduct was sufficient for a violation of this provision. The Ninth Circuit

has thereby significantly expanded the potential for lawsuits against peace officers.

Further compounding its error, the Ninth Circuit, in denying Sergeant Chavez's defense of qualified immunity, also held that its erroneous view of these provisions represents "clearly established law" of which any "reasonable" officer would be aware. Qualified immunity exists to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). The Ninth Circuit, however, has permitted interference with the investigative efforts of peace officers by significantly broadening the scope of potential lawsuits against them.

B. Respondent Martinez's Fifth Amendment Privilege Against Compelled Self-Incrimination Was Not Violated Because He Was Never Brought To Trial And His Statements Were Never Used Against Him

In *Martinez v. Oxnard*, the Ninth Circuit concluded that respondent Martinez's Fifth Amendment privilege against compelled self-incrimination was violated even though his statements were not admitted against him at trial. *Martinez*, 270 F.3d at 857. The Ninth Circuit is mistaken.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself."[1/] U.S. Const. amend. V. Respondent Martinez was not compelled in a criminal case to be a witness against himself.

---

1. In *Malloy v. Hogan*, 378 U.S. 1, 84 (1964), this Court held that the Fifth Amendment privilege against compelled self-incrimination is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the states. *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

He was not charged with a crime and his statements were not introduced against him in court. *Martinez v. Oxnard*, 270 F.3d at 857. Therefore, his Fifth Amendment privilege against compelled self-incrimination was not violated.

1. The Decisions Of This Court Have Made It Clear That *Miranda* Is A Trial Right Governing The Admissibility Of Evidence

Contrary to the Ninth Circuit's view, this Court has made it clear that the Fifth Amendment privilege against compelled self-incrimination is a trial right that governs the admissibility of evidence. Non-compliance with *Miranda* by police officers does not violate a person's Fifth Amendment privilege. Rather, a transgression of a person's Fifth Amendment privilege only occurs when a statement obtained in violation of *Miranda* is admitted into evidence.

The *Miranda* decision itself clearly indicates that it deals with the admissibility of evidence. "[W]e deal with the *admissibility* of statements obtained from an individual who is subjected to custodial interrogation . . . ." *Miranda*, 384 U.S. at 439 (emphasis added). "Our holding . . . briefly stated . . . is this: the prosecution may not *use* statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444 (emphasis added). "The constitutional issue we decide in each of these cases is the *admissibility* of statements obtained from a defendant while in custody . . . ." *Id.* at 445 (emphasis added). "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the *admissibility* of any statement made by a defendant." *Id.* at 476 (emphasis added).

Since *Miranda*, this Court has repeatedly affirmed that its holding dealt with the admissibility of evidence:

> In the years since the decision in *Miranda*, we have frequently reaffirmed the cental principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses *cannot be introduced into evidence* to establish his guilt.

Berkemer v. McCarty, 468 U.S. 420, 429 (1984) (emphasis added). "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be *excluded from evidence at trial* in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) (emphasis added).

Recently, this Court has reaffirmed that *Miranda* is a rule controlling the admissibility of evidence: "We therefore hold that *Miranda* and its progeny in this Court govern the *admissibility* of statements made during custodial interrogation in both state and federal courts." *Dickerson*, 530 U.S. at 431 (emphasis added).

Stated another way, this Court has explained that *Miranda* provides a trial right: "...[I]n protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial right*.'" *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (original emphasis). "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. Although conduct by law enforcement officers prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added).

Thus, this Court has made it clear that *Miranda* is a trial right governing the admissibility of evidence. Rather than creating an absolute requirement for police conduct in the field,

the *Miranda* decision creates a conditional requirement for the admissibility of evidence at trial. *See United States v. Balsys*, 524 U.S. 666, 692 (1998) [unlike the Fourth Amendment, which is violated at the moment of illicit intrusion, the Fifth Amendment presents a "conditional protection"]. Police conduct, alone, cannot violate a person's Fifth Amendment privilege against compelled self-incrimination. Therefore, Sergeant Chavez cannot be personally liable under § 1983 for violating respondent Martinez's rights under the Fifth Amendment for conduct that occurred in the field.

2. The Decisions Of Other Circuits Have Correctly Concluded That A Peace Officer's Non-Compliance With *Miranda* Does Not Violate A Suspect's Fifth Amendment Privilege Against Compelled Self-Incrimination And Therefore Cannot Give Rise To A Claim Under 42 U.S.C. § 1983

Other circuits considering the issue have concluded that peace officers cannot be sued under § 1983 for violating a suspect's Fifth Amendment privilege against compelled self-incrimination by failing to comply with *Miranda*. *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995) [failure to provide *Miranda* warnings does not result in a § 1983 claim if no statements were obtained]; *Deshawn E. v. Safir*, 156 F.3d 340, 346 (2nd Cir. 1998) ["The remedy for a violation of the right against self-incrimination is the exclusion from evidence of any ensuing self-incriminating statements and not a § 1983 action" (internal quotation marks omitted)]; *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994) ["The dissenting judges in (*Cooper v. Dupnik*) presented a persuasive argument that the Fifth Amendment privilege against self-incrimination is not violated until evidence is admitted in a criminal case"];

Riley v. Dorton, 115 F.3d 1159, 1164-65 (4th Cir. 1997) [no § 1983 action is available where no statement was admitted against the claimant]; *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989) (en banc) ["The remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action"]; *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987) [officers' failure to provide *Miranda* warnings did not deprive suspect of her constitutional rights since no statements obtained from her during custodial interrogation were used against her during trial]; *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) ["The *Miranda* decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence"]; *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) [failing to follow *Miranda* procedures triggers the exclusion of evidence, but does not permit a cause of action to lie for money damages under § 1983].

Contrary to the decisions of the First, Second, Third, Fourth, Eighth, Tenth and Eleventh Circuits, the Ninth Circuit has held that a person's Fifth Amendment privilege against compelled self-incrimination can be violated by non-compliance with *Miranda*, even though that person's statement is not admitted against him at trial. *See Cooper*, 963 F.2d at 1237 ["It is irrelevant that (the defendant's) statements were never introduced against him at trial"]. In *Martinez v. Oxnard*, the Ninth Circuit relied on its own flawed reasoning in *Cooper* to reach the same conclusion again. *See Martinez*, 270 F.3d at 857, citing *Cooper*, 963 F.2d at 1237. The Ninth Circuit stands alone in its error.

3. Since The Ninth Circuit's Erroneous View Of The Scope Of The Fifth Amendment Privilege Is Not "Clearly Established Law," Its Denial Of Qualified Immunity For Sergeant Chavez Was Improper

Qualified immunity protects public officials from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 806. Therefore, a person suing a public official under § 1983 must show that a reasonable person would have known that clearly established law prohibited such conduct.

In this case, the Ninth Circuit's erroneous conclusion regarding the scope of a person's Fifth Amendment privilege was not "clearly established." As stated above, the Ninth Circuit's conclusion contradicts Supreme Court authority. Furthermore, that such a view is not clearly established is demonstrated by the fact that every other Circuit considering the issue has reached a contrary conclusion. *Giuffre*, 31 F.3d at 1256.

Indeed, as the Fourth Circuit has noted, the fact that other judges dissented from the majority's conclusion in an earlier Ninth Circuit case considering the same issue demonstrates that the Ninth Circuit's view is not "clearly established":

> The dissents in *Cooper*, however, make persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case. The disagreement between the judges of the Ninth Circuit as to the correct interpretation of the relevant constitutional principles indicates that even at the time of the *Cooper* decision, the law was not clearly established.

Wiley v. Doory, 14 F.3d 993, 998 (4th Cir. 1994) (citations omitted).

It cannot be said that a reasonable officer would have understood the Ninth Circuit's erroneous conclusion regarding the scope of the Fifth Amendment privilege to be "clearly established" law. In the absence of settled law on the issue, the Ninth Circuit's conclusion that Sergeant Chavez was not entitled to qualified immunity was improper.

C. Police Conduct In The Field Must "Shock The Conscience" To Violate The Substantive Component Of The Fourteenth Amendment's Due Process Clause, A Standard That The Ninth Circuit Did Not Apply

It is possible for police to engage in conduct in the field that would render a resulting statement involuntary and therefore inadmissible at trial under the Fourteenth Amendment Due Process Clause. For example, coercion through the use of physical force, psychological mistreatment, threats, or official inducements, such as promises of leniency, benefits or immunity, could render a resulting statement involuntary and therefore inadmissible at trial. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Shotwell Mfg. v. United States*, 371 U.S. 341, 348 (1963); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997).

However, contrary to the Ninth Circuit's view, not all coercive police conduct violates a person's civil rights. A civil rights suit under 42 U.S.C. § 1983 requires a higher level of misconduct than that resulting in an evidentiary ruling suppressing evidence. Stated another way, police conduct may well be sufficiently coercive to render a suspect's statement inadmissible against him at his criminal trial, yet still be insufficiently coercive to constitute a violation of the

Constitution for which the suspect can sue civilly and receive monetary damages.

The substantive component of the Fourteenth Amendment's Due Process Clause requires that governmental conduct must "shock the conscience" before it rises to the level of a constitutional violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48 (1998); *Rochin v. California*, 342 U.S. 165, 172 (1952). Thus, in *Cooper v. Dupnik*, the Ninth Circuit properly upheld the plaintiff's § 1983 civil rights claim under the Fourteenth Amendment's Due Process Clause because the majority found the police conduct to be outrageous and shocking. *Cooper*, 963 F.2d at 1244.

Unlike the Fifth Amendment privilege, the Due Process Clause may be violated by police officers in the field. As this Court has stated, the constitutional violation is "complete when the wrongful action is taken." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

In the case at bar, on the other hand, the Ninth Circuit never discussed the "shock the conscience" standard. Rather, the court erroneously concluded that mere "coercive conduct" sufficed. *Martinez*, 270 F.3d at 857. Therefore, Sergeant Chavez's conduct was never assessed against the proper standard.

Police conduct must shock the conscience to be actionable under the substantive component of the Fourteenth Amendment's Due Process Clause. The Ninth Circuit failed to analyze Sergeant Chavez's conduct in light of the proper standard under that provision. Since a reasonable officer would not have recognized as "clearly established law" the Ninth Circuit's misapplication of the standard for police conduct under the Fourteenth Amendment's Due Process Clause, the Ninth Circuit's denial of qualified immunity for Sergeant Chavez was improper.

CONCLUSION

This Court should reverse the Ninth Circuit's ruling that Sergeant Chavez violated respondent Martinez's Fifth Amendment privilege against compelled self-incrimination. Police officers cannot violate a person's Fifth Amendment privilege during interrogation. The Ninth Circuit's denial of qualified immunity for Sergeant Chavez should also be reversed.

Furthermore, respondent Martinez's coercive interrogation claim should have been analyzed under the substantive component of the Fourteenth Amendment's Due Process Clause. Under that clause, the proper standard is whether police conduct shocks the conscience. The Ninth Circuit's ruling that mere coercive interrogation met that standard should likewise be reversed.

Dated: September 4, 2002

Respectfully submitted,

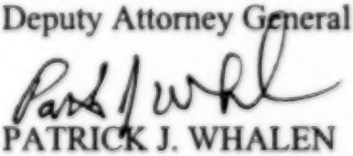
BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

STAN CROSS
Supervising Deputy Attorney General

LEE E. SEALE
Deputy Attorney General



PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record
Counsel for Amicus State of California